

In re: WALLACE BRANDON, JERRY W. GRAVES, AND KATHY GRAVES.

HPA Docket No. 98-0011.

Ruling Denying Jerry W. Graves and Kathy Graves' Motion for Stay of Order.

Filed September 18, 2001.

Colleen A. Carroll, for Complainant.

Brenda S. Bramlett, for Respondents.

Ruling issued by William G. Jenson, Judicial Officer.

HPA – Stay order, when appropriate – Balancing factors, application of.

The Judicial Officer (JO) denied Respondents' motion for an Order staying the Order directing sanctions and civil penalties against Respondent. JO applied the four part balancing test set out in *Ohio v. Nuclear Regulatory Comm'n*, 812 F.2d 288, 290 (6th Cir. 1987).

On July 19, 2001, I issued a Decision and Order as to Jerry W. Graves and Kathy Graves: (1) concluding that on August 28, 1997, Jerry W. Graves and Kathy Graves [hereinafter Respondents] violated the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831) [hereinafter the Horse Protection Act]; (2) assessing each Respondent a \$2,000 civil penalty; and (3) disqualifying each Respondent for 1 year from exhibiting, showing, or entering any horse and from managing, judging, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction. *In re Wallace Brandon* (Decision as to Jerry W. Graves and Kathy Graves), 60 Agric. Dec. ___, slip op. at 30, 49-51 (July 19, 2001).

On September 7, 2001, Respondents filed a "Motion for Stay of Order" requesting a stay of the Order in *In re Wallace Brandon* (Decision as to Jerry W. Graves and Kathy Graves), 60 Agric. Dec. ___ (July 19, 2001), pending the outcome of proceedings for judicial review. On September 10, 2001, the Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], filed "Complainant's Response to Respondents' Motion for Stay of Order" opposing Respondents' Motion for Stay of Order. On September 14, 2001, the Hearing Clerk transmitted the record to the Judicial Officer for a ruling on Respondents' Motion for Stay of Order.

The determination of whether a stay of an agency's order is warranted is based on a balancing of four factors. These factors are: (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the party seeking the stay will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if a stay is granted; and (4) the public interest in granting the

stay.¹

First, with respect to the likelihood that Respondents will prevail on the merits of their appeal, Respondents do not address the likelihood that they will prevail on the merits of their appeal. Complainant contends Respondents failed to file a timely notice of appeal and the United States Court of Appeals for the Sixth Circuit lacks jurisdiction to review *In re Wallace Brandon* (Decision as to Jerry W. Graves and Kathy Graves), 60 Agric. Dec. ____ (July 19, 2001) (Complainant's Response to Respondents' Motion for Stay of Order at 2-3).

Respondents state they filed a notice of appeal and a petition for review of *In re Wallace Brandon* (Decision as to Jerry W. Graves and Kathy Graves), 60 Agric. Dec. ____ (July 19, 2001), with the United States Court of Appeals for the Sixth Circuit "on or about the ____ day of September, 2001" (Motion for Stay of Order ¶ 5). Section 6(b)(2) and (c) of the Horse Protection Act limits the time within which a person may seek judicial review of an order of the Secretary of Agriculture, as follows:

§ 1825. Violations and penalties

(b) Civil penalties; review and enforcement

(2) Any person against whom a violation is found and a civil penalty assessed under paragraph (1) of this subsection may obtain review in the court of appeals of the United States for the circuit in which such person resides or has his place of business or in the United States Court of Appeals for the District of Columbia Circuit by filing a notice of appeal in such court within 30 days from the date of such order and by simultaneously sending a copy of such notice by certified mail to the Secretary. The Secretary shall promptly file in such court a certified copy of the record upon which such violation was found and such penalty assessed, as provided in section 2112 of title 28. The findings of the Secretary shall be set aside if found to be unsupported by substantial evidence.

¹*Ohio v. Nuclear Regulatory Comm'n*, 812 F.2d 288, 290 (6th Cir. 1987); *Cuomo v. Nuclear Regulatory Comm'n*, 772 F.2d 972, 974 (D.C. Cir. 1985) (per curiam); *Middlewest Motor Freight Bureau v. United States*, 433 F.2d 212, 241-42 (8th Cir. 1970), *cert. denied*, 402 U.S. 999 (1971); *Baggett Transp. Co. v. Hughes Transp., Inc.*, 393 F.2d 710, 716-17 (8th Cir.), *cert. denied*, 393 U.S. 936 (1968); *Associated Securities Corp. v. SEC*, 283 F.2d 773, 774-75 (10th Cir. 1960); *Eastern Air Lines, Inc. v. CAB*, 261 F.2d 830 (2d Cir. 1958) (per curiam); *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958); *In re David R. Hostetter, DVM*, 52 Agric. Dec. 366, 367 (1993) (Order Lifting Stay Order).

(c) Disqualification of offenders; orders; civil penalties applicable; enforcement procedures

In addition to any fine, imprisonment, or civil penalty authorized under this section, any person who was convicted under subsection (a) of this section or who paid a civil penalty assessed under subsection (b) of this section or is subject to a final order under such subsection assessing a civil penalty for any violation of any provision of this chapter or any regulation issued under this chapter may be disqualified by order of the Secretary, after notice and an opportunity for a hearing before the Secretary, from showing or exhibiting any horse, judging or managing any horse show, horse exhibition, or horse sale or auction for a period of not less than one year for the first violation and not less than five years for any subsequent violation. Any person who knowingly fails to obey an order of disqualification shall be subject to a civil penalty of not more than \$3,000 for each violation. Any horse show, horse exhibition, or horse sale or auction, or the management thereof, collectively and severally, which knowingly allows any person who is under an order of disqualification to show or exhibit any horse, to enter for the purpose of showing or exhibiting any horse, to take part in managing or judging, or otherwise to participate in any horse show, horse exhibition, or horse sale or auction in violation of an order shall be subject to a civil penalty of not more than \$3,000 for each violation. The provisions of subsection (b) of this section respecting the assessment, review, collection, and compromise, modification, and remission of a civil penalty apply with respect to civil penalties under this subsection.

15 U.S.C. § 1825(b)(2), (c).

The Decision and Order as to Jerry W. Graves and Kathy Graves specifically informs Respondents of the time within which they must file a notice of appeal, as follows:

ORDER

Paragraph I

....

C. Jerry W. Graves has the right to obtain review of this Order in the court of appeals of the United States for the circuit in which he resides or has his place of business or in the United States Court of Appeals for the District of Columbia Circuit. Jerry W. Graves must file a notice of appeal in such court

within 30 days from the date of this Order and must simultaneously send a copy of such notice by certified mail to the Secretary of Agriculture. 15 U.S.C. § 1825(b)(2), (c). The date of this Order is July 19, 2001.

Paragraph II

....
C. Kathy Graves has the right to obtain review of this Order in the court of appeals of the United States for the circuit in which she resides or has her place of business or in the United States Court of Appeals for the District of Columbia Circuit. Kathy Graves must file a notice of appeal in such court within 30 days from the date of this Order and must simultaneously send a copy of such notice by certified mail to the Secretary of Agriculture. 15 U.S.C. § 1825(b)(2), (c). The date of this Order is July 19, 2001.

In re Wallace Brandon (Decision as to Jerry W. Graves and Kathy Graves), 60 Agric. Dec. ___, slip op. at 50-52 (July 19, 2001).

The date of the Order, which is the subject of Respondents' Motion for Stay of Order, is July 19, 2001. *In re Wallace Brandon* (Decision as to Jerry W. Graves and Kathy Graves), 60 Agric. Dec. ___ (July 19, 2001). Pursuant to section 6(b)(2) and (c) of the Horse Protection Act (15 U.S.C. § 1825(b)(2) and (c)), the deadline for Respondents' filing their notice of appeal was August 18, 2001. Timeliness of an appeal from an administrative order is a jurisdictional requirement.² Therefore, I find that it is highly likely that the United States Court of Appeals for the Sixth Circuit will dismiss Respondents' late-filed appeal for lack of jurisdiction and that Respondents will not obtain review of the merits of their appeal.

Second, with respect to the likelihood that Respondents will be irreparably harmed absent a stay, Respondents state the disqualification provisions of the Order in *In re Wallace Brandon* (Decision as to Jerry W. Graves and Kathy Graves), 60 Agric. Dec. ___ (July 19, 2001), prevent them "from pursuing their interest in exhibiting or participating in any horse sale or auction during the pendency of their appeal to the Sixth Circuit Court of Appeals" (Motion for Stay of Order ¶ 6).

Respondent Jerry W. Graves testified that he is a farmer (Transcript at 143). Respondent Kathy Graves testified that she operates a nursing home and indicated that she has no other occupations (Transcript at 88). Therefore, while I find the disqualification provisions of the Order in *In re Wallace Brandon* (Decision as to Jerry W. Graves and Kathy Graves), 60 Agric. Dec. ___ (July 19, 2001), will irreparably harm Respondents, the harm caused by Respondents' 1-year disqualification from engaging in an endeavor that is not related to Respondents' livelihood is not substantial.

²*United States Dept of Agric. v. Kelly*, 38 F.3d 999, 1003 (8th Cir. 1994).

Respondents do not contend that the payment of the \$2,000 civil penalty which I assessed against each Respondent will result in irreparable harm. Economic loss does not constitute irreparable harm in and of itself.³ Therefore, I find Respondents' payment of the civil penalties assessed in *In re Wallace Brandon* (Decision as to Jerry W. Graves and Kathy Graves), 60 Agric. Dec. ____ (July 19, 2001), will not irreparably harm Respondents.

Third, with respect to the prospect that others will be harmed if I grant a stay, neither Complainant nor Respondents identify persons who would be harmed if I grant Respondents' Motion for Stay of Order.

The legislative history relevant to the Horse Protection Act Amendments of 1976 reveals the destructive effect of soring on the horse industry.⁴ The Order in *In re Wallace Brandon* (Decision as to Jerry W. Graves and Kathy Graves), 60 Agric. Dec. ____ (July 19, 2001), is designed to deter Respondents and other potential violators from future violations of the Horse Protection Act. To the extent that a stay order would diminish the deterrent effect of the Order in *In re Wallace Brandon* (Decision as to Jerry W. Graves and Kathy Graves), 60 Agric. Dec. ____ (July 19, 2001), the stay order would harm persons involved in the Tennessee Walking Horse industry.

Fourth, with respect to the public interest in granting the stay, neither Complainant nor Respondents identify the public interest in granting a stay order and, based on the record before me, I cannot identify any public interest in granting Respondents' Motion for Stay of Order.

I have considered the following factors: (1) the likelihood that Respondents will prevail on the merits of their appeal; (2) the likelihood that Respondents will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if I grant Respondents' Motion for Stay of Order; and (4) the public interest in granting Respondents' Motion for Stay of Order. After considering these four factors, I conclude, based on the record before me, that the July 19, 2001, Order in *In re Wallace Brandon* (Decision as to Jerry W. Graves and Kathy Graves), 60 Agric. Dec. ____ (July 19, 2001), should not be disturbed.

For the foregoing reasons, I deny Respondents' September 7, 2001, Motion for Stay of Order.

³*Ohio v. Nuclear Regulatory Comm'n*, 812 F.2d 288, 290 (6th Cir. 1987); *In re Jerry Goetz*, 60 Agric. Dec. 234, 236 (2001) (Ruling Denying Complainants' Motion to Lift Stay); *In re David R. Hostetter, DVM*, 52 Agric. Dec. 366, 368 (1993) (Order Lifting Stay Order).

⁴H.R. Rep. No. 94-1174, at 4-5 (1976), *reprinted in* 1976 U.S.C.C.A.N. 1696, 1698-99.